(3)

No. 99-882

Supreme Court, U.S.
FILED
MAR 02 2000
CLERK

In The
Supreme Court of the United States

GILBERT COPPER and ADELE NORBERG,

Petitioners,

vs.

CITY OF FARGO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

THOMAS W. CONDIT
Counsel of Record
Suite C-208
9403 Kenwood Road
Cincinnati, Ohio 45242
(513) 985-9333

PETER B. CRARY
Local Counsel
1201 12th Avenue North
Fargo, North Dakota 58102
(701) 280-9048

Attorneys for Petitioners

18pp

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PETITIONERS' REPLY BRIEF

On or about February 16, 2000, Respondents City of Fargo ("City"), Kevin Niemann, and Sherri Arnold filed a Brief in Opposition ("Opp. Brief") to the Petition for a Writ of Certiorari. Pursuant to Supreme Court Rule 15.6, Petitioners Gilbert Copper and Adele Norberg address the new points raised by Respondents.

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Petitioners believe that Respondents mischaracterized some of the picketing events which underlie this dispute. However, because the specific events are not relevant to the Rule 58 issues presented in the Petition, Petitioners will refrain from further comment on those points.

On the other hand, it is important for Petitioners to correct one serious misstatement in Respondents' brief regarding the procedural history of this case. Respondents stated that the Petitioners filed a Notice of Appeal in response to the District Court's Order on August 14, 1995, and that they "subsequently withdrew the previously timely filed Notice of Appeal." Opp. Brief at 4-5. Such a statement is absolutely false. The first Notice of Appeal filed in this action was filed by the City on April 22, 1998 (District Court Dkt. No. 143) in response to the final Judgment and attorney fee award by the District Court on March 31, 1998. Petition, App. H.

REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

Respondents concede two significant points:

1. The District Court order of August 14, 1995 (Petition, App. G), which is the focus of the Rule 58 issue presented for review to this court, "contained both legal reasoning as well as" an order. Opp. Brief at 4 n.3. Thus, Respondents concede that the order at issue was not set forth on a separate document.

2. Uniform application of Rule 58 to post-judgment orders would be desirable. "Respondents agree that uniform application of Rule 58 may be appropriate as the rule exists to create greater certainty in establishing the time for which an appeal from a final judgment should lie." *Id.* at 8.

Respondents, however, make three arguments that this case is an inappropriate vehicle for this Court to establish a uniform rule for applying the separate document requirement of Rule 58 to post-judgment orders. All three arguments are flawed, as explained point by point below.

I. Petitioners did not waive the Rule 58 separate document requirement by filing an abortive appeal from the August 14, 1995 order.

Appendix 1 of Respondent's Opposition Brief consists of a Notice of Appeal captioned in the United States District Court for the District of North Dakota and dated September 13, 1995. However, the District Court docket sheet for this case does not record the filing of the Notice of Appeal. See Appendix A to this Reply Brief. Therefore, this Court must disregard it.

"This Court must affirm or reverse upon the case as it appears in the record[.]" *Witters v. Washington Dept. of Servs. for Blind*, 474 U. S. 481, 489 n. 3 (1986). "We can not look out of [the record] for testimony to influence the Judgment of this court sitting as an appellate tribunal." *Russell v. Southard*, 12 How. 139, 159 (1851). *See also New Haven Inclusion Cases*, 399 U.S. 392, 450, n. 66 (1970) (Court refuses to consider newspaper articles not in the record.); *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 157-158, n. 16 (1970) (court refuses to consider statement of witness not found in trial court record).

However, in the event that this Court would for any reason consider the Notice Of Appeal which appears in Respondents' Appendix, Petitioners submit the following commentary for consideration. It is true that the Petitioners came very close to filing a Notice of Appeal in September, 1995, going so far as to serve it on the City's Attorney before they changed course and decided not to file it at all. The Petitioners spent no small amount of time wavering on whether an Appeal should be filed, whether it would be considered premature, and whether some important issues would be waived by filing an appeal (or by not filing an appeal) at that time. With the District Court having stated in its order that it had already granted a new trial on terms different from the relief sought by Petitioners (*i.e.*, granting Petitioners' request for a new trial against the City but denying a "damages only" trial against Niemann), Petitioners were faced with the kind of uncertainty which the Rule 58 separate document requirement is designed to eliminate, all of which only reinforces the need for clarification by this Court of mandatory post-trial procedure in the district courts.

However, even had Petitioners filed and withdrawn the Notice of Appeal, Respondents' "waiver" argument would still lack merit. In *United States v. Indrelunas*, 411 U.S. 216 (1973), the seminal case on the application of the separate document requirement of Rule 58 to questions of appealability, this Court addressed the identical objection raised by Respondents and rejected it. Petitioner in that case had taken an abortive appeal from a filed stipulation for damages prior to the entry of a formal judgment. This Court stated:

> The Court of Appeals appears to have been motivated in its conclusion, at least in part, by what it felt to have been the capricious conduct of the Government in first seeking to appeal following the filing of the stipulation for damages, and then later insisting that at that time there had been no judgment which it could have appealed from.

Id. at 221. This Court rejected such an argument for waiver precisely because, if accepted, it would vitiate the effectiveness of a mechanical application of the separate document requirement for purposes of establishing appellate jurisdiction.

> But whatever may be the appropriate sanctions available in a particular case for capricious conduct on the part of a litigant, we do not believe that a case-by-case tailoring of the "separate document" provision of Rule 58 is one of them.

Id. Respondents' waiver-by-abortive-appeal argument, being identical to that rejected in *Indrelunas*, requires no further comment.

II. The Rule 58 issue presented in the petition is not academic.

A. Resolution of the separate document question in favor of Petitioners would permit the lower courts to address the merits of Petitioners' constitutional claims, and/or to order a new trial.

If this Court grants the writ and determines that the Rule 58 separate document requirement applies to orders denying post-trial tolling motions, then the Eighth Circuit erred when it concluded that the District Court lost jurisdiction in 1995. Instead, the District Court retained its jurisdiction throughout the second trial and until it entered final judgment on a separate document on March 31, 1998. Petition, App. H. Consequently, upon remand the Eighth Circuit will have to consider the effect of the 1997 (second) trial on its merits, order a new (third) trial, or remand the case to the District Court for other appropriate proceedings.

When an appellate court remands a case for lack of compliance with Rule 58, a party can still "attempt to persuade the district court to reconsider" the underlying ruling. *Kersey v. Dennison Manufacturing Co.*, 3 F.3d 482, 485 (1st Cir. 1993). If Rule 58 is not satisfied, claims in the case "remain open until finally disposed of by the district court in a separate document." *Willhauck v. Halpin*, 919 F.2d 788, 793 (1st Cir. 1990). Thus, the Eighth Circuit order to vacate the second judgment and reinstate the first one would itself have to be vacated for consideration of further action on the merits. As the First Circuit stated:

> On remand, the lower court must consider whether it desires to change any of the previously entered interlocutory orders. After making its desired

> changes, if any, it is directed to enter final judgments disposing of the entire litigation in accordance with the Federal Rules of Civil Procedure.

Willhauck at 794.

B. The Eighth Circuit's focus on the absence of a formal Rule 59 order distracted it from attending to the formal Rule 58 separate document requirement.

Petitioners submit that the Eighth Circuit panel lost its focus on the critical issue when it diverted its attention to the absence of a new trial order, concluding:

> The district court lost jurisdiction to further litigate this case. The district court and the parties cannot waive the requirements of Rule 59. *See Nugent v. Yellow Cab Co.*, 295 F.2d 794 (7th Cir. 1961).

Petition, App. A at p. 8.

Hitching their wagon to the Eighth Circuit's reasoning, and also citing *Nugent*, Respondents argued that Petitioners "have not presented" to this Court the issue of the District Court's "fail[ure] to enter an order granting a new trial." Opp. Brief at 24 n.14.

Petitioners did not present the Rule 59 issue to this Court for a good reason: it is *not* the dispositive issue. The whole point of their Petition is that regardless of any defect or omission in the District Court's entries relating to the new trial motion, entries which could have been cured or clarified at any time at the request of a party, the District Court could not have lost jurisdiction in 1995 because it never properly entered a final appealable order in response to the new trial

motion. Indeed, the Eighth Circuit's citation to *Nugent* is curiously off point. The *Nugent* plaintiff failed to file her post-trial motions within the time allowed by the Civil Rules. Therefore, the time for appeal expired in *Nugent* and jurisdiction was lost, a reality which could not be waived by the parties. Petitioners *agree* with that result. In this case, by contrast, Petitioners filed a timely post-judgment motion which continued jurisdiction in the District Court, and which was never properly resolved, for appeal purposes, under Rule 58.

Petitioners are not claiming that jurisdiction can be waived when it was lost. Rather, they are asserting that under Civil Rule 58 the District Court never lost jurisdiction in the first place. If any waiver happened in this case, it was the City's waiver of any objection to a defective new trial order. Without ever suggesting that jurisdiction had been lost and without arguing that a second trial had not been ordered, Respondents took part in a second trial in August 1997. The District Court subsequently entered judgment on the jury verdict and awarded attorney fees on a separate document – a final appealable order. Petition, App. H. Only when the City filed its Notice of Appeal on April 22, 1998, did the District Court finally lose jurisdiction of the case.

C. The companion case is still being litigated.

Finally, this Court must not be misled (Opp. Brief at 1 n.1) into thinking that the Eighth Circuit's decision in *Veneklase v. City of Fargo*, 200 F.3d 1111 (8th Cir. 1999), moots the constitutional issues in this case. Not only are the two cases factually and legally distinguishable because of differences in the picketing routes, but on February 16, 2000, the Eighth Circuit granted rehearing en banc to review further the facial constitutionality issues decided in

Veneklase.[1] 2000 U.S. App. LEXIS 2255. The merits of this case are still very much in play.

III. This case is a proper vehicle for establishing a uniform rule for application of the separate document requirement of Rule 58 to post-judgment orders which commence the time for appeal.

A. Conflict with this Court's precedent and plain language of Appellate Rule 4(a).

Petitioners presented two reasons for granting the writ, the first of which Respondents do not address at all, and indeed concede, namely that the petition raises "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). Respondents argue, however, that the Fifth, Seventh, Eighth, and Ninth circuits do not require a separate document when entering an order denying a motion for new trial under Civil Rule 59(b), and that no other circuits have made an express holding requiring a Rule 58 separate document when denying a Rule 59(b) motion. Thus, Respondents contend there is no circuit split, and no need for review by this Court. They overlook, however, the obvious point that by their own count at least four circuits have waived this Court's requirement for "mechanical" application of the separate document requirement to fix the time when appeals commence to run. Such decisions are also in plain conflict with Appellate Rule 4(a), which clearly requires application of Rule 58 to post-judgment orders which restart the appeal clock. *See* Petition for Writ of Certiorari at 13-15.

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[1] Counsel for Petitioners in this case are also counsel for the plaintiffs in *Veneklase*, where they moved for en banc review because of the direct conflict between the *Veneklase* panel decision and *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996).

Thus, the refusal of four of the circuits to observe the mechanical requirements for starting the appeal clock is ample reason of itself for this Court to address and resolve the issue, regardless of the of a split in the circuits.

B. A considerable number of circuits are in conflict.

Respondents want this Court to take a myopic view of the issue in order to conclude that there is no conflict in the circuits. The First Circuit, however, regardless of whether the global issue was strictly before it, made a blanket ruling, with the aid of appointed amici, that Rule 58 applies "to all final orders denying and, *a fortiori*, granting post-judgment motions under Rule 50(b), 52(b), 59(b) and (e), and 60(b)." *Fiore v. Washington County Comm. Mental Health Ctr.*, 960 F. 2d 229, 234 (lst Cir. 1992) (*en banc*). This ruling was not dictum, but imposed a uniform rule of procedure which all district courts in the First Circuit are required to observe.

The D.C. Circuit, also with the aid of appointed amici, expressly allied itself with the First Circuit in regard to Rule 60(b) motions (except for *Fiore*'s 3-month limit), and indicated that all orders on Rule 4(a)(4) tolling motions should observe Rule 58, citing Appellate Rule 4(a)(7). *U.S. v. Haynes*, 158 F.3d 1327, 1330-1331 (D.C.Cir. 1998). In *Woods v. Wal-Mart*, 124 F.3d 219, 1997 WL 527668 (10th Cir. 1997) (*unpublished opinion*), the Tenth Circuit stated that it had previously applied Rule 58 "to the denial of a new trial motion," citing *Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987), and, citing *Fiore*, ruled generally that "[b]ecause the underlying principles are closely analogous," there is good reason "to adopt a uniform approach for all orders denying post-judgment motions." *Fiore*, 960 F.2d at 232. By any fair

reading, the First, Tenth, and D.C. Circuits are in conflict with the Fifth, Seventh, Eighth, and Eleventh Circuits on application of Rule 58 to denial of post-trial tolling motions.

C. Other circuits are in confusion.

The Ninth Circuit has one panel precedent requiring application of Rule 58 to orders denying a motion for a new trial, *Hard v. Burlington Northern Railroad Co.*, 870 F.2d 1454 (9th Cir. 1989), and a later panel opinion denying such a requirement. *Hollywood v. City of Santa Maria*, 886 F.2d 1228 (9th Cir. 1989). The Second and Sixth Circuits also have contradictory precedent. *See* Petition at 23-28.

IV. Conclusion.

For the above-stated reasons, this case provides an appropriate opportunity to establish a "bright line" rule for application of Rule 58's separate document requirement to all post-trial orders intended to commence the appeal periods defined in Appellate Rule 4(a)(1). Certiorari should be granted in the interest of resolving this important federal question governing the timeliness of appeals, Supreme Court Rule 10(c), and to resolve the conflict and confusion in the circuits. Supreme Court Rule 10(a).

Respectfully submitted,

THOMAS W. CONDIT
Counsel of Record
Suite C-208
9403 Kenwood Road
Cincinnati, Ohio 45242
(513) 985-9333

PETER B. CRARY
Local Counsel
1201 12th Avenue N.
Fargo, ND 58102
(701) 280-9048

Attorneys for Petitioners

APPENDIX

APPENDIX A – PARTIAL DOCKET SHEET OF CIVIL NO. A3-93-130 (D.N.D.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Civil No. A3-93-130

Gilbert Copper and Adele Norberg,

Plaintiffs,

v.

City of Fargo et al.,

Defendants.

. . .

8/14/95 84

ORDER by Hon. Karen K. Klein with NOTICE OF ENTRY: granting motion for leave to file reply br [83-1], granting motion to strike juror afdt [79-1], granting motion to ext time for appl atty fee [78-1], denying motion for new trial on damages issues only [77-1] (cc: all counsel) (lj)

8/14/95 85

REPLY BRIEF by plaintiff to defts response to Motion for New Trial and to Alter Judgment. (lj)

9/27/95 86

CLERK'S MINUTES: of status confr re: trial date before Hon. Karen K. Klein; discussion re: possible trial dates - pties & crt settled on 1/29/96 if case presently set then settles - crt will notify counsel soon. A pretrial confr will be held by tel approx 10 days prior to trial date - pltf may likely file mtn to bifurcate. Recess. (lj)

10/2/95 87

ORDER by Hon. Karen K. Klein: Final Pretrial conference set for 1/16/96 by tel. conf. initiated by crt at 10:30 (cc: all counsel) (jo) [Entry date 10/03/95]

10/2/95 88

NOTICE of Setting: Jury trial scheduled for 1/29/96 at 9:30 in Fgo bef. Mag. Klein; est. 4-5 days; (cc: all counsel, court officials) (jo) [Entry date 10/03/95]

12/27/95 89

MOTION by plaintiff, defendant to continue trial date (lj)